UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 04-70578

KEVIN COOPER,

Petitioner,

v.

JEANNE WOODFORD, Warden, San Quentin State Prison, San Quentin, California,

Respondent.

DEATH PENALTY CASE

EXECUTION IMMINENT:
Execution Date February 10, 2004

APPLICATION TO FILE SUCCESSOR PETITION FOR WRIT OF HABEAS CORPUS AND REQUEST FOR STAY OF EXECUTION

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I. INTRODUCTION

Kevin Cooper moves this Court, pursuant to 28 U.S.C. Section 2244(b), to permit the filing of his successor petition for writ of habeas corpus, and ensure that the State of California does not execute an innocent man on February 10, 2004. The petition, which is attached to this Motion, seeks to avoid the unconscionable miscarriage of justice that is threatened by the State of California's intentional use of false evidence, suppression of material exculpatory evidence, and continued concealment of its original misconduct.

The evidence against Mr. Cooper at trial was entirely circumstantial. The State relied most heavily on a single drop of non-victim blood from the crime scene, designated as A-41; cigarette butts found in the victims' car when it was recovered several days after the murders; and two shoeprints impressions, one of which was left in blood on a sheet near the victims. This petition provides ample evidence that each of these pieces of critical physical evidence was manufactured by the State. The petition and supporting exhibits unquestionably establish that if the current evidence had been disclosed at trial, no reasonable, fair-minded juror would have found the State's case strong enough to convict Mr. Cooper and sentence him to death. Indeed, the five of ten living trial jurors who have learned of the cascading

reasons for doubting the State's case, profoundly regret they were misled to vote for his death sentence.

The Blood Spot, A-41. Mr. Cooper's jury was led to believe that A-41 was identified as Mr. Cooper's blood, a conclusion that was based solely on the scientifically unsound testing procedures conducted by San Bernardino Sheriff's criminologist, Daniel Gregonis. Although trial counsel attempted to investigate the unreliability of Gregonis' results, these efforts were thwarted by the State's representations that the entire sample of A-41 had been consumed in the testing before trial. Twelve years after the State said A-41 had been consumed and years after Mr. Cooper filed his first amended habeas corpus petition, in conjunction with Mr. Cooper's request for DNA testing of the physical evidence, the State abruptly changed its story: Now it said that somehow a remaining sample of A-41 existed after all and that DNA testing identified it as Mr. Cooper's blood. What the State did not disclose, however, was that prior to the purported DNA testing, Gregonis had removed the A-41 specimen container and a sample of Mr. Cooper's saliva from the evidence storage facility. Gregonis did not return this critical evidence for 24-hours, and never plausibly explained what he did with it during that time. In 2003, during a hearing on Mr. Cooper's motion for further testing, Gregonis lied under oath, falsely denying that he broke

the seal that protected A-41 or tampered with A-41 during the time that it was in his unsupervised custody. Laboratory photographs demonstrate that the seal on A-41 was, in fact, broken before the DNA testing.

Gregonis' perjured statements and his unexplained access to A-41 for 24 hours for no reason are facts that could not have been developed at the time of the filing of the first federal petition, and amply support Mr. Cooper's claim that the State contaminated evidence prior to trial and continue to conceal that misconduct.

The Cigarette Butts. Mr. Cooper's jury was led to believe that a cigarette butt, found among several in the victims' car, was made with prison-issued tobacco. An exhaustive inventory of items in the car did not identify cigarette butts, which later were said to have been found in the victims' car. The police did report finding cigarette butts, however, in the abandoned house where they knew Mr. Cooper had been staying. After being cataloged in the police report describing the search of the house, and photographed, this critical physical evidence inexplicably disappeared. In 2003, the State claimed that DNA analysis of the cigarette butt introduced at trial confirmed that it contained Mr. Cooper's saliva. Only later did Mr. Cooper learn that the State apparently had altered or switched the evidence again in an effort to prove its case. The length of the DNA tested cigarette (seven millimeters)

in 2001 was almost twice the length of the cigarette butt (four millimeters) that the State introduced at trial and claimed had been found in the victims' car. This objectively verifiable alteration in the evidence purportedly introduced at trial can be explained only as gross mishandling and contamination of the evidence.

The disclosure of this fact, which again occurred long after Mr. Cooper filed his first petition, supports Mr. Cooper's claim that the incriminating cigarette butt allegedly found in the victims' car was most likely one of those that disappeared from the abandoned house.

Shoeprint Impressions. The State used false evidence to convince Mr. Cooper's jury that certain shoeprint impressions at the scene were made by a type of shoe provided only to inmates. The inmate who testified that he provided Mr. Cooper with a pair of tennis shoes recently stated that he gave Mr. Cooper a different type of tennis shoe. In turn, the warden of the California Institution for Men in Chino, where Mr. Cooper was incarcerated, recently disclosed that, contrary to the prosecution's assertion, the tennis shoes distributed at the prison were not unique to the prison or specially designated shoes, but were common and widely-available tennis shoe. At the time of trial, she provided this information to the lead law enforcement investigators in Mr. Cooper's case, who failed to provide this critical information to Mr.

Cooper's attorney or correct the false evidence presented to the jury.

Under compulsion of pattern California jury instructions (*see* CALJIC 2.01), Mr. Cooper's jury could not have convicted Mr. Cooper if it had been aware of these ever weakening links in the State's chain of circumstantial evidence.

The petition, however, relies on more than the evidence with which Mr. Cooper fairly should have been able to avoid a finding of guilt. Rather, Mr. Cooper seeks a fair chance to affirmatively demonstrate his innocence and the State's manufacturing of evidence. Through readily available mitochondrial DNA testing of blond hairs found in one of the victim's hands, and testing for the presence of the preservative agent EDTA on a T-shirt, the State belatedly claimed contained Mr. Cooper's blood, the question of Mr. Cooper's innocence can be answered once and for all.

In contrast to the jurors, who were misused as the instrumentality to inflict a death sentence they do not condone, the only decision makers who can express confidence that Mr. Cooper should be executed are those who refuse even to consider the new evidence or to question the State's reasons for shying away from definitive testing. On January 23, 2004, when Mr. Cooper attempted to file in San Diego Superior Court a writ of habeas corpus, motion for mitochondrial DNA testing and habeas corpus discovery,

and motion to preserve and recover trial exhibits – the court took the unprecedented action of refusing even to *file* the papers, despite the provisions of California Penal Code Section 1405. Mr. Cooper's attempts to secure redress from the California Supreme Court were rebuffed, when that Court refused to order informal briefing before denying his state habeas petition. In the hallowed tradition of seeking redress from federal courts when, in the state context, "'all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection,'" *Mitchum v. Foster*, 407 U.S. 225, 241 (1972) (citation omitted), Mr. Cooper turns to this Court to vindicate his rights because the California process has failed in this case.

Aside from the fact the evidentiary predicates for the multiple claims in this petition were only recently disclosed by the State, and arise from State misconduct that was hidden by law enforcement to such a degree that they could not have been discovered previously despite petitioner's exercise of due diligence, the most clearly exculpatory evidence remains in the hands of the State. Mr. Cooper therefore finds himself in the same position as the petitioner in *Thomas v. Goldsmith*, 979 F.2d 746, 749 (9th Cir. 1992):

> In order for Thomas to overcome the procedural bar by means of the miscarriage of justice exception, he must supplement his claim with a 'colorable showing of factual innocence.' [citations and footnote omitted] A semen sample, or tests thereof,

> might enable him to make such a showing. However, if Thomas must make a colorable showing of innocence before the district court may order a full evidentiary hearing on his defaulted claims, Thomas is in something of a Catch-22. The sample, if it exists, is under the control of the state, and Thomas would appear to have no way to have it tested unless the federal courts intervene. But in order to make the showing which would justify federal court intervention, Thomas needs the semen sample.

This Court concluded in *Thomas* that the constitutional claim need not be "defeated by this conundrum." *Id.* Instead, the Court held that in light of the allegations "that the state possesses evidence which would demonstrate his innocence . . . fairness requires that on remand the state come forward with any exculpatory evidence it possesses." *Id.* at 750.

Mr. Cooper's showing satisfies the prerequisites underlying the Court's "gatekeeper" functions as prescribed by section 2244(b)(2). The newly discovered evidence – including evidence of Gregonis' false statements and continuing attempts to prevent Mr. Cooper from proving his innocence – demonstrates that the incriminating implications of the State's most critical physical evidence were false. This new evidence, which could not have been developed in the exercise of due diligence before the DNA proceedings in state court and subsequent investigation, provides the "factual predicates" for compelling constitutional claims. In turn, the "evidence as a whole" – including the detailed confession of one of the three persons who actually committed the crimes – establishes by clear and convincing

evidence that, but for the State's treachery, no reasonable fact finder would have been misled to find Mr. Cooper guilty.

As applied to California, the requirements of Section 2244(b) are intended to vindicate "the interests of a State of some 32 million persons in enforcing a final judgment in its favor." *Calderon v. Thompson*, 523 U.S. 538, 552 (1998). Conversely, no citizens of California have the reasonable expectation, nor should they live in the appreciable fear, that the State will be permitted to execute a man whom it has falsely convicted. Permitting Mr. Cooper to file his petition, and prove his innocence, will therefore vindicate the legitimate interests of all parties, as well as the overarching interests of justice.

II. STANDARDS AUTHORIZING CONSIDERATION OF SUCCESSOR *HABEAS* PETITIONS

Pursuant to the amendments to Title 28 U.S.C. Section 2244(b)(2)(B) and (b)(3), this Court serves as a "gatekeeper" to determine whether the district court should be authorized to consider claims raised for the first time in a second or successive habeas corpus petition. The "new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what used to be called in habeas corpus practice ' abuse of the writ.'" *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998) (quoting *Felker v. Turpin*, 518 U.S. 651, 657, 664 (1996)).

A. SECTION 2254(B) DOES NOT APPLY TO CLAIMS THAT WERE NOT RIPE FOR FILING IN THE FIRST PETITION FOR WRIT OF *HABEAS CORPUS*

A claim is not subject to the requirements of 28 U.S.C. 2244(b) when the events that give rise to the claim occurred after the resolution of the prior habeas petition. *See Stewart*, 523 U.S. at 644-45 (1998) (petitioner's claim that he was incompetent to be executed, which had not previously been adjudicated, was not second or successive application for habeas relief under AEDPA); *Hill v. State of Alaska*, 297 F.3d 895, 898-99 (9th Cir. 2002) (petitioner did not need permission from the Ninth Circuit to file successive habeas petition because claims challenging parole date "could not have been included in earlier petitions challenging his conviction and sentence"); *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998) (petitioner's second habeas petition not considered successive under Section 2244 because the events challenged, i.e., the loss of good time credits in prison, had not taken place at the time the initial petition was resolved).

B. THE *PRIMA FACIE* SHOWING REQUIRED BY SECTION 2244 (B)

The standard for authorizing consideration of the new claims is whether petitioner has established a prima facie showing that (1) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (2) the facts underlying the claim, if

proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(B). A "prima facie showing" is established by "a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Flowers v. Walter*, 239 F.3d 1096 (9th Cir. 2001) (emphasis in original) (quoting *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997) (per curiam) (quoting *Bennett v. United States*, 119 F.3d 468 (5th Cir. 1997)); *see also Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002) (per curiam) ("a prima facie showing is not a particularly high standard"). "[If] . . . it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application." *Woratzeck*, 118 F.3d at 650.

Evaluation of the prima facie case is based on the assumption that the facts supporting petitioner's claim are true. *See, e.g., In re Boshears*, 110 F.3d 1538 (11th Cir. 1997). If petitioner makes a prima facie showing as to one of the claims, he or she is entitled to proceed upon the entire application in the district court. *See* 28 U.S.C. § 2244(b)(4); *Nevius v. McDaniel*, 104 F.3d 1120, 1121 (9th Cir. 1996) ("[t]he proper procedure under the [AEDPA] is for this court to authorize the filing of the entire successive ap-

plication" upon a showing that one claim meets the requirements of Section 2244).

Satisfaction of the due diligence prong of the standard is met by showing that petitioner has "some good reason why he or she was unable to discover the facts supporting the motion" in time to litigate the claim during the first habeas petition. *In re Boshears*, 110 F.3d 1538 (11th Cir. 1997); *see also Felker v. Turpin*, 101 F.3d 657, 662 (11th Cir.), *cert. denied*, 519 U.S. 989 (1996) (denying application because applicant failed to demonstrate that the means for discovering the facts were not available until after he had unsuccessfully litigated his first habeas petition); *United States v. Walus*, 616 F.2d 283, 303-04 (7th Cir. 1980) ("due diligence" requirement in Rule 60(b) context "is circumscribed by a rule of reason," and is not to be measured against hypothetical efforts that could have been undertaken under less difficult circumstances or "if the defendant had been more wealthy").

The second prong of the standard is satisfied if the facts underlying the claim establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found petitioner guilty of the underlying offense. *In re Boshears*, 110 F.3d at 1541; *see also United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000) ("a reasonable fact finder could have found that [petitioner] was, at a minimum, subject to

aider and abettor liability").

As demonstrated below, the verified allegations in the proposed petition for writ of habeas corpus establish "a sufficient showing of possible merit to warrant a further exploration by the district court" as to Mr. Cooper's due diligence in discovering and presenting the claim of substantial constitutional violations, as well as the unquestionable existence of clear and convincing evidence that absent these violations, no reasonable juror would have convicted Mr. Cooper of murder.

C. SECTION 2244 (B)'S DUE DILIGENCE REQUIREMENT MAY NOT CONSTITUTIONALLY BAR CONSIDERATION OF CONSTITUTIONAL CLAIMS WHEN A PETITIONER HAS MADE A SUFFICIENT SHOWING OF ACTUAL INNOCENCE

When a petitioner is actually innocent of a capital crime, the requirements of 28 U.S.C. Section 2244(b)(2) need not be satisfied for a second or successive habeas corpus application to be considered by the district court. Actual innocence must be a constitutional safety valve that protects an innocent person from execution, and allows for the vindication of constitutional violations that, but for their existence, the innocent person would not have been found guilty. *See Schlup v. Delo*, 513 U.S. 298 (1995); *Herrera v. Collins*, 506 U.S. 390 (1993); *McCleskey v. Zant*, 499 U.S. 467 (1991). Any restriction on second or successive habeas petitions that ignores actual inno-

cence itself as a gateway to review denies Mr. Cooper his right to be free of cruel and unusual punishment under the Eighth Amendment and Due Process of Law under the Fourteenth Amendment, and constitutes a suspension of the writ under Article I, Section 9, Clause 2 of the United States Constitution. The interest of the AEDPA in the prompt assertion of habeas claims and finality are not discarded by permitting a habeas petition to be reviewed when the petitioner is innocent. When the State is seeking to exact the ultimate and surely final punishment of death upon a person who is innocent, the principles of finality and comity "must yield to the imperative of correcting a fundamentally unjust incarceration [and sentence of death]." *See Engle v. Isaac*, 456 U.S. 107, 126 (1982). As the Supreme Court recognized in *Schlup*:

> The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.' *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); *see also* T. Starkie, Evidence 756 (1824) ("The maxim of the law is . . . that it is better that ninety-nine . . . offenders should escape, than that one innocent man should be condemned"); *see generally* Newman, Beyond "Reasonable Doubt," 68 N.Y.U.L.Rev. 979, 980-981 (1993); *Schlup*, 513 U.S. at 324-25 (footnote omitted).)[1]

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[1] Similarly, any purported failure of Mr. Cooper to comply with California's procedural rules does not bar review of the claims in the successor petition. This Court must consider the merits of Mr. Cooper's claims, de-

III. THIS COURT SHOULD PERMIT MR. COOPER TO FILE THE SUCCESSOR PETITION BECAUSE *CLAIM ONE* SATISFIES THE REQUIREMENTS OF 28 U.S.C. SECTION 2244 (B)

The quintessential miscarriage of justice is the execution of a person who is entirely innocent, no matter how "due" the process might otherwise be. *Schlup*, 513 U.S. at 324-25. The fundamental injustice that would result from an execution in such circumstances is so intolerable that it must be avoided at all costs.

The threshold of a substantive claim of actual innocence requires a truly persuasive showing of innocence. *Herrera*, 506 U.S. at 417; *see also Schlup*, 513 U.S. at 315-16. A petitioner asserting a free-standing actual innocence claim "must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (citing *Herrera*, 506 U.S. at 442-44 [Blackman, J., dissenting]).

Mr. Cooper has met this burden. Mr. Cooper testified at trial and un-

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spite a procedural default, because his claim of actual innocence is sufficient to bring him within the "narrow class of cases . . . implicating a fundamental miscarriage of justice." *Schlup*, 513 U.S. at 315 (quoting *McCleskey*, 499 U.S. at 494). In order to have his claims heard on the merits, Mr. Cooper need only show "that a court cannot have confidence in the outcome of the trial." *Id.* at 316. The standard requires a showing that in light of all the evidence, including new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. The court must consider all the evidence, including evidence illegally admitted, wrongly excluded, or that has become available after the trial. *Id.* at 327-28.

equivocally denied committing the Ryen/Hughes murders, or going to the Ryen house. (Ex. 74 at 811.) He acknowledged that he escaped from the California Institute for Men ("CIM") in Chino and hid in a house (the "Lease house") close to the Ryen house for a couple of days. He left that house sometime after 8:00 p.m. on Saturday night, June 4, and hitchhiked to San Ysidro, near the border of Mexico. He then went to Tijuana where he rented a hotel room under the name Angel Jackson. (*Id.* at 809-10, 812-17; Ex. 75 at 824-27, 833-37.) His check-in that afternoon was independently verified by the hotel clerk, and the sign in log from the hotel confirms that Angel Jackson checked in at approximately 4:30 p.m. on Sunday, June 5. (Ex. 76 at 843-45; Ex. 77 at 851.)

There is no evidence of any motive that Mr. Cooper would have had to either enter the Ryen's house or commit the murders. Clearly theft was no motive inasmuch as money and other valuables were left in plain view only a few feet from the victims' bodies. (Ex. 79 at 881-82.) One of the Ryen vehicles was parked in the driveway with keys in the ignition so the break-in and murders were not needed to steal the car. (Ex. 78 at 875.)

The nature and magnitude of the violence also strongly indicates that it was not the product of a single assailant. (Ex. 62 at 677, 680, 684.) At least three weapons were used, a hatchet, at least one knife and an ice pick.

It is much more likely that multiple assailants wielding multiple weapons are responsible for the murders. That was the initial opinion of the opinion of the pathologist who performed the autopsies on the victims. (Ex. 63 at 693-94.) This theory is also supported by a wealth of evidence, much of which the jury never heard.

There was one survivor of the attack that night, Joshua Ryen. During the days immediately following the attack, he had communicated on several occasions to police and others concerning his observations and impressions from that night. (Ex. 53 at 607; Ex. 54; Ex. 55 at 617, 619, 621-22; Ex. 58 at 644, 646, 648; Ex. 59 at 656-58.) Joshua Ryen stated that there were three assailants, not one, and that they were not African-American. (*Id.*) On two different occasions, when Josh saw a photograph of Mr. Cooper's face on television, he expressly and affirmatively stated that Mr. Cooper was not the person that committed the crimes. (Ex. 60 at 664-65; Ex. 61 at 670-71.)

Evidence not only shows that multiple assailants, not including Mr. Cooper, committed this crime, the evidence gives strong indication as to who two of these assailants were. Five days after the Ryen murders, a disinterested witness, Diana Roper, gave police specific information that a convicted murderer, Lee Furrow, may have participated in the murders. (Exs. 82, 84.) On the night of the murders, Furrow, who was Roper's boyfriend,

came to Roper's house to change clothes. (Ex. 121 at 1113-14.) Two male companions of Furrow waited outside in the car. (*Id.*; Ex. 84 at 915.) At the time, Roper believed that Furrow was acting oddly (in much the same way as when he had murdered a young girl years earlier). (Ex. 84 at 917.) Then, after she heard about the Ryen murders, she checked the coveralls that Furrow had removed that evening and found them covered with blood. (Ex. 121 at 1114.) She immediately called the San Bernardino Sheriff's Department and turned the bloody coveralls over to police. (Ex. 84 at 916.) When Roper learned that a hatchet may have been involved, she checked Furrow's tools and realized his hatchet was missing. (*Id.*) Incredibly, the Sheriff's Department destroyed the coveralls without subjecting them to any tests or evaluation. (Ex. 86 at 932.) The deputy who destroyed the coveralls has testified that they were heavily spattered with blood and were destroyed in direct violation of police procedures requiring all blood stained items to be submitted immediately to the crime lab. (Ex. 83 at 904; Ex. 125 at 1162-63.)

Furrow is not the only third party who has been specifically implicated in the Ryen murders. While incarcerated in Vacaville prison, Kenneth Koon confessed that he and two other individuals had committed the murders. (Ex. 85.) Koon's cellmate reported this confession and confirmed it

several times with details that are strikingly similar to the facts reported by Diana Roper and other witnesses. (*Id.*) Koon told his cellmate that he and two others had gone to a residence in Chino, where his two companions had gone into the house, armed with hatchets and committed the murders. (*Id.*) Koon and Furrow were acquaintances at the time. Koon's comments that he and the other participants were wearing coveralls corroborate Diana Roper's statements and the bloody coveralls worn by Lee Furrow that she gave to police. The State turned a blind eye to the Koon confession, just as it turned a blind eye to Lee Furrow and Diana Roper. (Like other witnesses, Koon talked about multiple assailants and using hatchets as the primary murder weapon.)

The State has also persistently ignored the significance of hair clutched in the victims' hands. This hair, much of it blond, does not belong to Mr. Cooper or any other African-American. To whom does it belong? Mr. Cooper cannot say because the State has vigorously resisted efforts to DNA-test this hair.

Ironically, even the evidence relied on most heavily by the State supports a finding of innocence. The State's case against Mr. Cooper was entirely circumstantial and the State based its entire case on of physical evidence supposedly connecting Mr. Cooper to the crime. Yet, each such

item of physical evidence was mishandled in ways that not only cast doubt on its probative value but strongly suggests a concerted effort to convict Mr. Cooper regardless of his innocence. The evidence concerning such mishandling and the suspicions and inferences that arise as a result of law enforcement actions have only grown over time.

The State presented evidence that a bloody shoeprint was found on a sheet from the Ryens' bedroom and that this shoeprint bore a distinctive pattern from a specific type of tennis shoe generally available only to inmates and not to the general public. In support of this theory, the State presented evidence of a Chino cellmate of Mr. Cooper's who testified that he gave Mr. Cooper a pair of the specific type of tennis shoes with this distinctive pattern (Pro Keds). (Ex. 103 at 1015.) Recently, this same inmate recanted this testimony and says that he gave Cooper a different type of tennis shoe (PF Flyers). (Ex. 100.) Moreover, the warden of the CIM in Chino where Mr. Cooper was incarcerated has recently disclosed in a sworn declaration, that she conducted a personal inquiry around the time of the Ryen murders regarding the types of tennis shoes made available to inmates. (Ex. 101.) She determined that the tennis shoes carried by the CIM in Chino were not prison-manufactured or specially designated shoes. (*Id.*) Rather, the tennis shoes used in the Chino CIM were common tennis shoes available to the

general public through any number of retail and department stores. (*Id.*) The recanted testimony and sworn statements from the warden have only recently come to light and put in question not only the substance of the shoeprint evidence but how it was contrived in the first instance.

Equally troubling and increasing questions have arisen concerning another piece of physical evidence relied upon by the State. The only evidence presented at trial that Mr. Cooper was actually in the Ryens' house was based on a single spot of non-victim blood, referred to as A-41, found near the baseboard in the hallway of that house. (Ex. 89 at 946.) The circumstances surrounding the collection of this blood spot have always been perplexing. There were serious questions as to why this single blood spot was selected by the State for collection. It was equally perplexing why blood evidence in the same vicinity as A-41 was never collected, and why other blood spots in the general vicinity were tested but results of those tests withheld from the defense. (Ex. 89 at 946-47; Ex. 129.)

Even more troublesome was the State's testing and handling of A-41 both before and after trial. Prior to trial, the State's criminalist, Gregonis, conducted his tests on A-41 in a manner designed to create a match with Mr. Cooper. While Gregonis testified that he was not aware of Mr. Cooper's potential involvement with the murders when he conducted initial tests on A-

41, and that he had used a blind testing approach, this was a lie as shown by his own lab notes. (Ex. 147 at 1984-87; Ex. 148 at 1994-98.) Then, after Mr. Cooper was arrested, the criminalist placed A-41 on the same plate as Mr. Cooper's blood and lied about that as well. (Ex. 151 at 2011-12.) He conducted tests in such a way as to insure that the defense could not duplicate them or independently verify his conclusions he. (Ex. 113 at 1077-83; Ex. 12 at 50-51.) He advised the defense that A-41 had been consumed in the testing process, but twice found more of the sample to test. (Ex. 12 at 50-51.)

More recent developments cast even greater doubt on what was already a suspicious sequence of events surrounding A-41. When the issue of DNA testing first arose, the same criminalist, Gregonis, who had conducted the skewed tests on A-41 before trial was supposedly asked to determine whether it still existed. (Ex. 105 at 1036.) For unexplained reasons, Gregonis checked out A-41, along with other evidence, including Mr. Cooper's saliva, for a 24-hour period. (Ex. 146 at 1959-81.) When asked about this in June of 2003, the criminalist testified that he did not open the containers containing A-41. (Ex. 192 at 2394-96.) In fact, however, photographs demonstrate that this testimony was false, and that he had done exactly that. (Exs. 36, 38.)

Similarly, the State presented false evidence when it introduced cigarette butts allegedly found in the Ryens' station wagon when it was recovered after the murders. Because those cigarette butts contained tobacco of a type commonly found in prisons, the presence of those cigarette butts were cited by prosecution as evidence that Mr. Cooper had used the Ryen car. Even at the time, there were questions about this contention. Detective Hall, who did a detailed initial inventory of the contents of the Ryen car when it was first recovered did not identify the cigarette butts anywhere except the ashtray that the State claimed were present. (Ex. 17.) Moreover, while it was never disputed that Mr. Cooper stayed in the Lease house for two full days and smoked a number of cigarettes during that time, only a single cigarette butt was retrieved from that house and logged into evidence. (Exs. 33, 102 at 1009-10; Ex. 167 at 2166, 2172.) The others are unaccounted for. The prosecution has never explained how or why this critical evidence disappeared.

Equally suspiciously, one of the cigarette butts supposedly found in the Ryen's car, denominated V-12, was subjected to non-DNA testing before trial and was measured at four millimeters. (Ex. 95.) The defense was advised that this cigarette butt was entirely consumed during testing before trial, only to find V-12 inexplicably reappear during trial. (Ex. 169 at 2181-

83; Ex. 97 at 994-98.) When this V-12 cigarette butt was later DNA tested in 2001, it was measured at seven millimeters in length. (Ex. 98.) Evidence of the clear manipulation of the cigarette butts yields the inescapable conclusion that the State planted the cigarette butts in the Ryens' car.

The serious and increasing questions concerning each item of physical evidence relied upon by the prosecution are, themselves, additional proof of Mr. Cooper's innocence. This has become especially important in light of the results of DNA testing that was performed at the request of Mr. Cooper. Those DNA tests on A-41, the cigarette butts, and a bloody T-shirt matched positive to Mr. Cooper. Ordinarily, this would constitute strong evidence of Mr. Cooper's guilt. However, where there is a persistent and increasing pattern of evidence mishandling, irregularities, and unexplained questions, those DNA results point equally strongly to a continuing effort to implicate Mr. Cooper in a crime that he did not commit.

The State has vigorously resisted Mr. Cooper's efforts to obtain proof that the DNA test results are merely the latest example of a persistent law enforcement effort to manipulate evidence against him. One piece of evidence that can clearly be tested for police manipulation is the bloody T-shirt. That T-shirt tested positive for Mr. Cooper's blood. (Ex. 15.) Like all other items of physical evidence presented by the State, the T-shirt itself raises se-

rious questions about police handling. The same criminalist who performed the questionable testing on A-41 also tested the T-shirt before trial. The results of the clippings taken from the T-Shirt of at least one of these tests was never provided to the defense. (Ex. 163.) More importantly, the blood pattern on the T-shirt as it was originally found was described much differently than the blood patterns found on the shirt when it was subjected to DNA testing. (Ex. 160; Ex. 162 at 2125-27; Ex. 15 at 199.) For this reason, as well as others, Mr. Cooper has requested that the T-shirt be tested for the presence of the preservative EDTA. If high concentrations of EDTA were found, this would strongly indicate that the blood on the T-shirt came not from Mr. Cooper during the commission of a crime, but from blood taken from him after his arrest and after it was treated with preservative used in evidence collection tubes and vials.. Fearing the results of such tests, the State has steadfastly refused to allow them, even at Mr. Cooper's own expense, and even at a time when such tests would have caused no delay or prejudice to the State.

As one of the jurors noted at the time of trial, Mr. Cooper would not have been convicted if there had been one less piece of evidence. (Ex. 108 at 1044.) This was so even when the jury knew nothing about the Koon confession, Furrow's involvement, the recantation by one witness, or the war-

den's statement that the supposedly special prison-issued tennis shoes were a complete fabrication. Not surprisingly, presented with just some of this evidence, five jurors have expressed doubts about their own verdict. (Exs. 3-7.) Justice Browning of this Court has noted that, "[t]he prosecution's case was not particularly strong." *Cooper v. Calderon*, 308 F.3d 1020, 1025 (2002).

There is convincing evidence that Mr. Cooper is innocent. For this reason, his execution would be a manifest injustice.

This Claim was raised recently in the California Supreme Court and denied on February 5, 2004. Although not required to do so, Petitioner has demonstrated due diligence in raising it now. Many features of this claim arose this past summer, when the State produced false testimony by Gregonis in state court and when counsel were able to obtain information from Blake and Wraxall, the criminalists at trial who had previously made themselves unavailable.

IV. THIS COURT SHOULD PERMIT MR. COOPER TO FILE THE SUCCESSOR PETITION BECAUSE *CLAIM TWO* SATISFIES THE REQUIREMENTS OF 28 U.S.C. SECTION 2244 (B)

Petitioner has set forth allegations of fact more than sufficient to make out a prima facie case for relief, entitling him to litigate the merits of Claim Two in the district court.

In Claim Two, Cooper alleges that the State contaminated, tampered

with or destroyed key pieces of evidence,[2] presented misleading and false testimony,[3] and withheld material exculpatory evidence at trial and in post-conviction.[4] The heart of this claim is that the state at trial, and through to

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[2] The Fourteenth Amendment obliges the State to take affirmative steps to preserve evidence which "might be expected to play a significant role in the suspect's defense," where the evidence both possesses "an exculpatory value that was apparent before the evidence was destroyed" and is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 488-89 (1984). Even under the standard of *Arizona v. Youngblood*, 488 U.S. 51 (1988), applicable where the exculpatory value is indeterminate but the destroyed evidence was "potentially useful" to the defense, *Youngblood*, 488 U.S. at 58, a showing of bad faith will establish a due process violation. *See also Miller v. Vasquez*, 868 F.2d 1116 (9th Cir. 1988) (holding that bad faith failure to collect potentially exculpatory evidence, like failure to preserve such evidence, violates due process). The evidence in Mr. Cooper's case meets both the *Trombetta* and *Youngblood* standards.

[3] "[A] conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *see also Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (The presentation of false testimony is "inconsistent with the rudimentary demands of justice" and violates the Due Process Clause, requiring a reversal of the conviction). The United States Supreme Court "has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). This applies not only to the knowing presentation of false testimony, *Napue*, 360 U.S. 264, but also to instances where the false testimony is unsolicited by the state, *Giglio v. United States*, 405 U.S. 150, 154 (1972), and even where the prosecution simply allows a witness to give a false impression of the evidence. *See, e.g., Alcorta v. Texas*, 355 U.S. 28, 31 (1957).

[4] For forty years it has been clear that the federal Constitution requires prosecutors to disclose all evidence favorable to the defendant that is material either to guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83, 86-87 (1963) (prosecution's failure to disclose material evidence favorable to defendant violates due process, irrespective of good or bad faith of prosecution); Carriger, 32 F.3d 463 (holding that the prosecution is obligated by the

today, continues a pattern of deception and manipulation of evidence, inept and corrupt practices, and concealing the official misconduct.

A number of these events have occurred, although some aspects have been raised throughout the litigation in state and federal court. As this Court is undoubtedly aware, a great deal of evidence at trial was funneled through a single criminalist, Daniel Gregonis (A-41; the cigarettes found in the Ryen vehicle; the T-shirt). Moreover, as the Court is aware, his practices and the results he obtained were severely questioned by defense counsel, and he was caught in several attempts to disguise his actions, and outright lies under oath. Gregonis has been and continues to be, a centerpiece in the state's case against Kevin Cooper. Every step of the way, his testing and practices have been highly controversial.

Cooper fought for years to have DNA testing done on the evidence, and only after the enactment of Penal Code Section 1405 did the State agree, and only to a fraction of what Cooper requested. In the midst of dispute over DNA testing, the State secretly directed criminalist Gregonis to "view" the

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requirements of due process to disclose material exculpatory evidence on its own motion, without request). In determining whether certain evidence is material, the reviewing court must take into consideration the cumulative effect of the evidence suppressed by the prosecution. *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995). The evidence is material when the result of the proceeding would have been different had the prosecutor disclosed the evidence to the defense. Id. at 434-35. The obligation to disclose Brady material extends through post-conviction proceedings. Thomas, 979 F.2d at 749-

evidence. (Ex. 105 at 1036.) Why the state would select the one person who has become a lightening rod for this case, only they can answer. But unquestionably the State contended and succeeded in shielding Gregonis' activities from Mr. Cooper. The result of such surreptitious behavior was entirely predictable: Gregonis continued his deceptive and manipulative practices by opening the container to A-41. When placed under oath in 2003, he lied and claimed he had only viewed the bag. (Ex. 192 at 2394-96.) A clear photograph shows his initials and the date on the bag and an altered tape seal, a marker that an examination of the evidence was in fact conducted. (Exs. 36, 38; Ex 93) There is only one reason for this deception – hiding the fact that he manipulated the evidence. There is only one inference to be drawn – Kevin Cooper is innocent, the state knows it, and the state continues to protect a corruptly-obtained conviction and death sentence.

A great deal was made at a recent state court hearing about the fact that Gregonis did not have Cooper's blood out when he "viewed" A-41 and other evidence. (Ex. 192.) What is not mentioned, however, is that Gregonis examined the same bag as Cooper's saliva and V-17, a cigarette butt supposedly found in the Ryen car. So, contrary to the state's false impression,

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Gregonis had all he needed in 1999, and a cloak of secrecy to disguise his actions. Further, even the state's own evidence is suspect -- the evidence logs for the reference samples of Cooper's blood contradict the testimony about who took it out and when. (Ex. 92.)

This is not the only piece of evidence tainted by the state's corruption. Whatever was found in the Ryen car was not what was tested to find Cooper's DNA. V-12, one of the cigarette butts found in the Ryen's car, was completely exhausted prior to trial. (Ex. 169 at 2181-83.) This was information verified by both the state's criminalist (not Gregonis), and the defense criminalist. It was a small, 4 mm piece that was unfolded, submerged in liquid substrate, all saliva extracted, and discarded. (Ex. 95.) It was so small that no viable test results could be obtained and it could not be linked to Cooper.

Without explanation, V-12 reappeared at trial, along with some loose "prison" tobacco, in an effort to tie Cooper to the tobacco and the car. (Ex. 97 at 994.) In their haste to link Cooper with false evidence, the State officials failed to account for the criminalists who had examined, measured and tested V-12 who created a record of the evidence tampering. In 2001, at the time of DNA testing, V-12 surfaced yet again and was examined and measured. (Ex. 98.) It was folded up and 7 x 7 mm, larger that whatever re-

mained before consumption in 1984. (*Id.* at 995.)

Mr. Cooper has demonstrated to this Court innumerable times that both pieces of evidence were highly questionable from the beginning of his case. When V-12 and its companion V-17 were first found, initial meticulous examination of the car had not disclosed them, but instead only found cigarette butts in the ashtray that subsequently disappeared, undoubtedly because of their potential exculpatory value. (The Ryens did not smoke; Doug Ryan smoked a pipe, accounting for loose tobacco. It is a virtual certainty that whoever committed the murders and stole the car smoked those cigarettes and left behind their DNA.) (Ex. 17.) Likewise, cigarettes disappeared from the Lease house where Cooper is known to have smoked, including one that appears similar to V-17. (Ex. 18; Ex. 167; Ex. 33; Ex. 102 at 1009-10.) A cigarette butt also disappeared from Cooper's car that looks very much like V-12. (Ex. 34.) Another hand rolled cigarette butt found in Cooper's car and taken into evidence (item QQ), has now disappeared as well. (Ex. 171 at 2199.)

The tale of A-41 is even more disjointed. Blood found on the wall nearby was sent for testing and when the results began to exculpate Mr. Cooper, that testing was stopped. (Ex. 211.) Counsel was never notified of this and was left with the impression that there was no suitable amount for

testing, which was untrue. Twice, Gregonis claimed A-41 was all gone so unavailable for defense testing, and twice it re-appeared. (Ex. 12 at 50-51; Ex. 153 at 2023-24.) Gregonis claimed he did blind testing, but that was false: he had Cooper's profile each time he tested for a certain characteristic. (Exs. 147 at 1984-87; Ex. 148 at 1900-2001; Ex. 150 at 2007.) Gregonis falsely denied that he ran his tests on the same plate. (Ex. 151 at 2101-12.) Gregonis swore A-41 matched Cooper, but when corrected by his own results, changed both to match again. He then altered his notes to cover this up. (Ex. 152 at 2015-18; Ex. 12 at 74-75.) Of course, Gregonis' photographs and notes do not allow for an independent review of his results. (Ex. 113 at 1078-82.)

A-41, thought long gone, reappeared in 1998 during post-conviction counsel's review of the evidence in a bag containing Mr. Cooper's blood and saliva. (Exs. 90; 92; Ex. 114.) Only, this time it appeared as a capped vial with white matter and a metal tin. Inside the tin was another vial with a small chip. In 2001, when it was DNA tested, and two years after Gregonis' secret examination, A-41's capped vial had a loose top, and the vial inside the tin was empty. (Exs. 208; 203.)

Not one piece of evidence escapes this litany of misconduct. The T-shirt, found in a ditch nearby but which could not have come from Cooper,

the Lease house or the Ryen residence (Ex. 166 at 2370-71; Ex. 29 at 205) was subject to testing at trial the results of which have never been disclosed to the defense. (Exs. 159 at 2092-93; Ex. 163.) It was taken from the evidence storage along with Cooper's clothing for over a month, without any legitimate chain of custody records. (Ex. 27; Ex. 165.) Its character changed over time from a blood stain to include blood smears, then blood spatter. (Exs 160; Ex. 161 at 2120; Ex. 162 at 2125-27.) When it arrived for DNA testing in 2001, the bag containing the T-shirt was opened and torn. (Ex. 209.) Gregonis, who had the T-shirt in his lab, mysteriously never photographed it, although he did the other items of evidence (the photos have not been turned over to current counsel), nor did he diagram it in his notes as is standard practice and had been done for the other pieces of evidence. (Ex. 117 at 1101-04.)

Evidentiary manipulation pervades this case: bloody coveralls the police were informed that the bloody coveralls (worn by an alternate suspect with a murder conviction) were intentionally destroyed on the first day the State realized defense counsel was going to call law enforcement witnesses at the preliminary hearing (Ex. 84, Ex. 125 at 1161); a bloody hatchet sheath appeared in the Lease house where it was not before (Ex. 172 at 2214), and officers perjured themselves when they denied their presence in that room

during an earlier search, only to be confronted with their own fingerprints (Ex 25 at 180-83); a rope clearly not from the Lease house or the Ryen's is found in that same room (Ex. 174 at 2223); and, the chief pathologist altered his opinion that three persons were responsible once the State's theory focused on Mr. Cooper (Ex. 182 at 2275-77).

Equally spectacular and prejudicial is the amount of evidence ignored or allowed to degrade once the State believed they had their man. As soon as blood spots surrounding A-41 tested inconsistent with Cooper, the State told its criminalist to halt testing (Ex. 89 at 947; Ex. 90); a bloody shoeprint underneath A-41 was never preserved (Ex. 177 at 2236-37, 2240); blood that could only have been the perpetrators' was ignored (Ex. 176 at 2232; Ex. 178 at 2244-48); highly suspect blood at the scene was never tested (*id.*); fingerprints on the doorways have never been identified (Ex. 177 at 2236-37, 2240); the fingernail scrapings of the victims were consumed by Gregonis with worthless testing (Ex. 180 at 2255-59); and, a carpet and wallboard were put in inadequate storage so no reconstruction was possible (Ex. 181 at 2263-71).

Finally, it cannot be ignored that the major actors were themselves the subject of discipline and prosecution. The most significant was San Bernardino Sheriff's Department Crime Lab manager William Baird, who was the

one to find a shoeprint in his lab on a Ryen sheet that no one else had noticed, when he happened to have the same shoe just lying around. (Ex. 210.) He was a heroin addict and drug dealer who was fired for taking drugs from the lab. (Ex. 107.) Gregonis' actions in another case from the same time period contain strikingly familiar instances of evidence manipulation and destruction. (Ex. 188.)

This pattern of destruction, manipulation, contamination, and tampering is clear and convincing evidence that no jury, had they known of it, would have convicted Mr. Cooper. Recently, witnesses have begun to come forward as Mr. Cooper's execution approaches, alleging serious admissions of misconduct by State officials. (Ex. 190.)

This claim, as constructed, was raised in the California Supreme Court and denied on February 5, 2004. Although some of the facts constituting State misconduct have been known since trial, many others were not. The newly discovered facts include: evidence of manipulation of A-41 and Gregonis' blatant falsehood concerning his examination of the evidence in July 2003; the facts indicating that all of V-12 was used up in the testing prior to trial (only recently verified by the criminalist); the facts surrounding the State's failure to candidly admit there is hair in the victims' hands suitable for DNA testing at that same hearing; the fact that the State directed its

criminalist not to test blood found near A-41 when the results were beginning to exculpate Mr. Cooper, and the fact that some of those blood spots now are available for testing; and, new evidence that police manipulation and tampering occurred at the scene.

The violations of Mr. Cooper's constitutional rights continue to this day – with each examination of the evidence it changes character after contact with state officials. It is now, for the first time, that Petitioner has clear evidence and support for his arguments that his constitutional rights have been and continue to be violated.

V. THIS COURT SHOULD PERMIT MR. COOPER TO FILE THE SUCCESSOR PETITION BECAUSE *CLAIM THREE* SATISFIES THE REQUIREMENTS OF 28 U.S.C. SECTION 2244 (B)

Continuing its crusade to ensure Mr. Cooper's wrongful conviction and death sentence, the State trampled further upon Mr. Cooper's constitutional rights by not disclosing to the defense key pieces of impeaching and exculpatory evidence as required under *Brady,* 373 U.S. 83. The defense was not apprised, for example, that the Supervising Criminalist in this case, William Baird, was a heroin addict, highly motivated to do the prosecutor's bidding to avoid close scrutiny of his activities. (Ex. 107.) Eventually Baird resigned from his post after stealing drugs from an evidence locker. (*Id.*) In two other cases of *credible* state officials who offered material, exculpatory

information and had no motive to lie, the State suppressed the evidence entirely. The defense never learned that an experienced California Corrections Counselor, Richard C. Krupp, had given the police information about alternative, multiple suspects for the crime. (*See* Ex. 109.) Nor did they learn that the then-current Warden of CIM, Ms. Midge Carroll, gave specific information to the police about the wide availability of the standard sneakers issued to all inmates at CIM, that *directly* refuted the trial testimony of a prosecution witness, who testified that shoeprints at the scene were "extraordinarily unique" and therefore could be matched to Kevin Cooper with little doubt. (*See* Ex. 101.)

As a result of these constitutional *Brady* and false evidence violations, Mr. Cooper was denied the right to a fair trial and a reliable guilt and penalty determination, and nothing less than plenary review, including an evidentiary hearing, will provide the full and fair judicial resolution thus far denied to him.

The Due Process Clause requires that a prosecutor disclose to a criminal defendant all material, exculpatory evidence in his or her possession. *Kyles*, 514 U.S. at 433 (citing *Brady*, 373 U.S. at 87). *Brady* material includes both direct and impeachment evidence. *See Kyles*, 514 U.S. at 437; *United States v. Bagley*, 473 U.S. 667, 682 (1985), and may relate either to

guilt or punishment. *See, e.g., Giglio,* 405 U.S. at 154. The prosecutor's duty under *Brady* is self-executing. The prosecutor must turn over *Brady* material with or without a request, and even if the defense conceivably could have procured the evidence independently. *Giglio,* 405 U.S. at 154; *see also United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986). That duty extends through these post-conviction proceedings. *Thomas*, 979 F.2d at 749-50 (9th Cir. 1992), and the good or bad faith of the prosecutor is of no consequence in alleging a prima facie violation. *Brady*, 373 U.S. at 87; *see also Giglio*, 405 U.S. at 154 (for *Brady* purposes, it is irrelevant whether prosecutor's non-disclosure is result of "negligence or design.")

Favorable exculpatory or impeaching evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, , 473 U.S. at 682 (citations omitted). A "reasonable probability" is a probability sufficient "to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. To prevail on a *Brady* claim, therefore, a habeas petitioner must meet the following three-part test: (1) the evidence at issue must be favorable to the accused either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be mate-

rial. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). To prevail on a related claim of presenting false and misleading evidence, a habeas petitioner must show that there is "any reasonable likelihood that [the knowing use of false testimony] could have affected the judgment of the jury." *Napue*, 360 U.S. at 271.[5]

Most important, the evidence in question must be evaluated against "the record as a whole." *See Bagley*, 473 U.S. at 683. Time and again, the State destroyed, suppressed, ignored, or lied about each piece of evidence in a methodical, secretive campaign to present the jury with a false and misleading picture of "the record as a whole." *Brady* condemns this malfeasance, and requires that a court look to the cumulative impact of the nondisclosures, rather than evaluate them item-by-item. *Kyles*, 514 U.S. at 434, 436; *see also Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002) (witness's perjury regarding deal for leniency with prosecution warranted reversal, particularly in combination with *Brady* violations and other state misconduct).

By withholding Warden Carroll's information that contradicted trial

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[5] The prosecutor has a duty to correct false testimony known to be false regardless of whether defense counsel is aware of the falsity. *Belmontes v. Woodford,* 335 F.3d 1024, 1044 (9th Cir. 2003); *see also Bagley*, 473 US. 682; *Napue*, 360 U.S. at 271. Even if the prosecution did not have knowledge of the false evidence, a conviction cannot stand where there is a reasonable probability that had the evidence been disclosed, the result of the proceedings would have been different. *Bagley*, 473 U.S. at 678.

testimony that the sneakers were "extraordinarily unique," and that would have significantly minimized the importance of shoeprint evidence, the prosecutor was able to misleadingly amplify and exaggerate the importance of this questionable forensic evidence. This suppression of material evidence clearly violated the duty under *Brady*; and the prosecutor compounded that constitutional error by knowingly presenting the contrary false testimony to mislead the jury, in violation of *Napue*.

In an egregious instance of the prosecution's non-disclosure of impeachment evidence, the prosecutor failed to inform the defense of the regular and continuous drug use of the Supervising Criminalist William Baird. (Ex. 107.) This information alone would have seriously thrown into question Baird's ability to fulfill his obligations as a criminalist; suggested an incentive for him to curry favor with the prosecution; and spurred a defense investigation as to the full extent of Baird's problems and deceptions while under the powerful influence of heroin. *See Benn v. Lambert*, 283 F.3d 1040 (9th Cir.), *cert. denied*, 123 S.Ct. 341 (2002) (*Brady* reversal in capital case where prosecution informant lied about drug use, fabricated crimes for own benefit, continued to use drugs while acting as an informant, and eventually "deactivated" as informant due to untrustworthiness). The prosecutor has a duty to investigate the background of his or her own witnesses, and cannot

hide behind a claim of ignorance if no investigation is done. *See*, *Carriger*, 132 F.3d at 480 (reversal where prosecutor failed to review Department of Corrections file on star witness containing material impeachment) (*en banc*); *see also Commonwealth of Mariana Islands v. Bowie*, 243 F.3d 1109 (9th Cir. 2001). The prosecutor must look for material evidence in the custody of any other members of the prosecution team, such as the police, coroner, crime lab, or corrections officials. *See Kyles*, 514 U.S. at 437; *see also United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995).

Finally, the State concealed more evidence of alternative assailants by failing to disclose information from a prison corrections counselor, Mr. Richard Krupp, that three Hispanic men were overheard in prison bragging about their involvement in the crimes. (Ex. 109.) The prosecution also prejudicially suppressed and failed to disclose material exculpatory information, unavailable to counsel despite due diligence, that one of the prisoners from Chino told Donnie Eddings, a Chino correctional counselor, that the Ryen family was murdered in retaliation for Doug Ryen's cooperation with police in connection with a burglary by a Hispanic gang. (Ex. 109 at 1046.) (*See* Claim Four, *infra*.)

As with Warden Carroll's statements, the State, with no basis upon which to challenge the veracity and sincerity of the statements of either of

these state officials, chose instead to ignore it, depriving the defense once again of exculpatory evidence it could have used to develop its defense strategy and mount a just innocence defense. *See, e.g., Kyles*, 514 U.S. 419 (undisclosed materials warranting reversal included best physical description of assailant did not match defendant).

Had the jury known of Baird's illegal drug use, the State's false and misleading evidence that shoeprints were "unique," and the counselor's report of alternate suspects – and evaluated this malfeasance in light of the numerous other instances of state misconduct here – it is clear that the jury's impression of the overall integrity, propriety and trustworthiness of the police's investigation and circumstantial case against Mr. Cooper would have been drastically different. *Kyles*, 514 U.S. at 420 (facts tending to show lack of integrity in investigation, such as "remarkably uncritical attitude" of police, relevant to *Brady* inquiry). Absent the State's subterfuge, there is more than a "reasonably probability" that the result of the trial would have been a verdict of not guilty. In its haste to orchestrate the conviction of Mr. Cooper, the State has forgotten that its "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Bagley*, 473 U.S. at 675 n.6 (citations omitted). Justice will be done for Mr. Cooper only when his unlawful conviction and death sentence have been set aside.

This Claim, along with the others pled herein, goes directly to the question of Cooper's innocence. There is clear and convincing evidence that but for the constitutional violations herein and throughout, no reasonable jury would have found him guilty.

Because the factual bases for this claim only recently became available to counsel within the past month (Ex. 211), it was raised for the first time in the California Supreme Court on February 2, 2004 and denied on February 5, 2004. The claim that the state withheld evidence of Baird's criminal behavior (which Mr. Cooper does not concede began in 1984 as he states), was originally brought in Mr. Cooper's first habeas petition filed on June 19, 1997, and denied without discovery or a hearing by the District Court on August 27, 1997, because Mr. Cooper could not prove Baird was using drugs or dealing them during his investigation of the Mr. Cooper matter (there was no possible way to do so without the requested discovery and a hearing). However, Baird's misconduct was also the subject of a recent state application for his files so as to establish the dates of his involvement in drug use and dealing, an application that was denied only two weeks ago. As such, the claim in its entirety, is presented in as quickly a fashion as possible.

VI. THIS COURT SHOULD PERMIT MR. COOPER TO FILE THE SUCCESSOR PETITION BECAUSE *CLAIM FOUR* SATISFIES THE REQUIREMENTS OF 28 U.S.C. SECTION 2244 (B)

Joshua Ryen was the sole survivor and eyewitness to the crimes for which Cooper was convicted. Immediately after he was hospitalized following the attacks, when his memories of the attacks were presumably most accurate, Ryen, then eight-years old, repeatedly stated in the presence of law enforcement, hospital employees, a relative, and a therapist that three men committed the attack and that the perpetrators were definitely not black. Mr. Cooper is black.

The petition sets forth allegations which demonstrate prima facie that Mr. Cooper is entitled to relief as a result of the admission of the videotaped examination of Joshua Ryen and an audio-taped session between Mr. Ryen and his therapist, which violated Mr. Cooper's rights to a fair trial, compulsory process, confrontation, to present a defense, a reliable determination of guilt by a jury that was not mislead by false evidence and information, conviction upon proof beyond a reasonable doubt, and to be free from cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

The state violates a petitioner's due process rights if it coerces or interferes with a witness. *Pyle v. Kansas*, 317 U.S. 213 (1942). The prosecution

may not present evidence that is made unreliable as the result of such improper threats or coercion. *Id.* at 215-16; *see also Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997); *United States v. Chiavola*, 744 F.2d 1271 (7th Cir. 1984). The use of suggestive and coercive interview techniques with a child witness can produce unreliable statements and testimony. *See Idaho v. Wright*, 497 U.S. 805, 818 (1990) (despite the spontaneity of a child's hearsay statement concerning sexual abuse, the statement lacked particularized guarantees of trustworthiness for purposes of the confrontation clause as a result of the suggestive manner in which the questioning was conducted).

Additionally, a petitioner's constitutional right to compulsory process is violated if he or she is deprived of "testimony [that] would have been relevant and material, and . . . vital to the defense." *Washington v. Texas*, 388 U.S. 14, 16 (1967). Thus, in addition to showing that the state's conduct substantially interfered with a witness's ability to testify or rendered the testimony that was given unreliable, Petitioner must also make a "plausible showing" of how the evidence would have been material and favorable to the defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1981). Materiality is defined as whether there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceedings would have been different. *Bagley*, 473 U.S. at 678.

The Due Process Clause requirement of fundamental fairness and the Eighth Amendment guarantee against cruel and unusual punishment further mandate reversal of a conviction and death sentence obtained on the basis of false and unreliable evidence. *See Manson v. Brathwaite*, 432 U.S. 98 (1977); *Simmons v. South Carolina*, 512 U.S. 154 (1994) (Due Process Clause requires that defendant be permitted to inform jury of parole ineligibility to correct misimpression created by state argument that he will present a danger to community if not sentenced to death); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (Eighth Amendment violated where jury given inaccurate information regarding the availability of appellate review of its decision to sentence defendant to death); *Gardner v. Florida*, 430 U.S. 349 (1977) (Due Process violated where death sentence is based in part upon false information contained in probation report that defendant had no opportunity to rebut); *Townsend v. Burke*, 334 U.S. 736, 740 (1948) (non-capital sentence imposed on the basis of materially untrue assumptions regarding defendant's previous criminal record violates Due Process Clause and must be vacated). Constitutional error still occurs whether or not the prosecutor knew the testimony was false. *Killian*, 282 F.3d at 1208. A conviction cannot stand if there is a reasonable probability that had the evidence been disclosed the result of the proceedings would have been different. *Bagley*, 473 U.S. at 678.

The Due Process Clause further mandates reversal of a conviction further if the prosecution has knowingly presented false testimony at trial. *Napue*, 360 U.S. 269. The prosecutor has a duty to correct false testimony regardless of whether the defense counsel knows that the testimony is false. *See Belmontes*, 335 F.3d at 1044 (9th Cir. 2003); *Napue*, 360 U.S. at 269-70. A conviction based on the prosecutor's knowing use of false evidence must be reversed if there is any reasonable likelihood that it could have affected the judgment of the jury. *Napue*, 360 U.S. at 271; *Agurs*, 427 U.S. at 103.

The first person to communicate at the hospital with Joshua Ryen was Dames Gamundoy, the clinical social worker in the emergency room. (Ex. 53 at 594.) He provided his name, date of birth, and telephone number accurately, and stated that at least three Caucasian people attacked his family. (*Id.* at 604, 606.) Calvin Fischer, a registered nurse assigned to the emergency room, confirmed Mr. Gamundoy's account of the interview. (Exs. 54, 65.) Deputy Sheriff Dale Sharp was the second person to talk about the attacks with Ryen in the Hospital, and Ryen mentioned three attackers to him as well. (Exs. 66.)

On June 6, 1983, sometime before noon, Detective Hector O'Campo of the San Bernardino Sheriff's Office ("SBSO") was assigned to develop a

rapport with Ryen. At that time, O'Campo was already aware that Ryen had said the perpetrators were three white men. (Ex. 58 at 639-41.) Shortly thereafter, Cooper became a suspect and O'Campo then sought to convince Joshua Ryen that Cooper was responsible, and he manipulated the child's testimony to support this theory. (Ex. 58 at 648, Ex. 57 at 632-37.)

During their first session together on June 6, Ryen told O'Campo three Hispanic males perpetrated the attack, just as he had done several times previously. Nurse Headley, and Joshua Ryen's grandmother Dr. Mary Howell were present. (Ex. 57 at 632-35; Ex. 67.) Yet O'Campo denied many aspects recalled by Headley and Howell. (Ex. 58 at 648.) Indeed, O'Campo actually denied that he talked to Ryen at all about three Hispanic perpetrators or about what happened to the Ryen family before the interview of June 14, 1983. (*Id.*)

On June 14, 1983, in the late afternoon or early evening, Detective O'Campo conducted a detailed interview of Ryen with psychologist Jerry Hoyle present. (Ex. 68.) O'Campo did not tape record the interview, but took notes, which he then destroyed after he wrote a formal report. Hoyle also took notes, including direct quotes from Ryen. (Ex. 69.) O'Campo omitted from his report all plural descriptions of the perpetrators while Hoyle's notes state that Ryen repeatedly used the word "they" in describing

the attack. (*Contrast* Ex. 69 *with* Ex. 68.) Prior to trial, after learning that Hoyle's notes differed critically from his own on the number of perpetrators, O'Campo returned to the hospital to interview Gamundoy and Fisher, and to pick up a set of Hoyle's notes. (Ex. 58 at 649-51.)

Ryen also saw photographs of Cooper on television while he was still in the hospital, well before Cooper's arrest. When Ryen first saw Cooper's photograph on television, he clearly stated that Cooper was not the killer. A law enforcement officer present at the time confirmed this (Ex. 189 at 2360-61.)

Despite due diligence efforts by counsel, Cooper does not possess additional formal written reports of subsequent contacts with Ryen. However, information in the record proves not only that before Cooper was arrested, Ryen was made aware of law enforcement's theory that Cooper was guilty of the crimes, but also that subsequent contacts with Ryen regarding Cooper's culpability occurred, and that officers attempted to suppress critical evidence regarding this contact. There could be only one reason for this: they worked on Joshua Ryen until he could no longer clearly remember that Cooper was not the perpetrator.

Ryen's uncle told his nephew of the arrest by telling him only "Josh, I just want to let you know that they caught Kevin Cooper." For that state-

ment to have meaning to Ryen, he would have to know Cooper's identity and law enforcement's views on his culpability for the crimes. (Exs. 70, 71.) Ryen asked if the police were sure that Cooper was the right suspect, to which his uncle replied "they're very positive that Kevin Cooper is the man they were looking for." (Ex. 70.)

At trial, an audio-taped interview of Ryen was played for the jury and conducted on December 1, 1983, by his psychotherapist Lorna Forbes, in which Ryen recalled seeing a single man with a puff of hair standing over his mother. Tellingly, Ryen's statement that his assailant had a puff of hair was inconsistent with Cooper's appearance at the time of the murders, but consistent with information the police thought was accurate. During the media frenzy following the murders, Cooper's photo was repeatedly shown with a combed out Afro. Yet, when Cooper escaped from Chino his hair was in braids. (Ex. 73 at 798-800.) If Cooper had unbraided and combed out his hair into an Afro in the Lease house, the only place Cooper stayed prior to the attacks in the Ryen house, then a substantial amount of hair would have been found in the Lease house. None was found. (Ex. 167.)

Moreover, in a videotaped examination conducted in December 1984 by the prosecutor and played for the jury, Ryen reported seeing a single shadow. Again, this does not match the repeated initial statements by Ryen

that three attackers were present. (Ex. 53 at 604, Ex. 59 at 657.)

What caused the sudden and drastic change in Ryen's testimony? Ryen's subsequent descriptions of his attackers were a false memory created by the relationships formed with law enforcement, the repetitive questioning, his repeated viewing of Mr. Cooper on television, and the subsequent details of the capture of Mr. Cooper as well as discussions with relatives, law enforcement and therapists. Intentional law enforcement interference resulted in both Ryen providing later statements that were highly suspect and unreliable, and the loss of Ryen's earlier statements providing material, exculpatory evidence of Mr. Cooper's innocence. Consequently, the jury heard the false memories of Ryen, that there was one perpetrator who had a puff of hair similar to Mr. Cooper's hair after his arrest.

This claim was presented for the first time in the California Supreme court on February 2, 2004 and denied on February 5, 2004. While the full extent of the State's misconduct in this regard is not known because no reports of subsequent conduct have been revealed, it is clear that Mr. Ryen's testimony was the product of substantial coercion. What was perhaps the most effective voice for cooper's innocence was muted, so much so that the California Supreme Court, in its decision, all but forgot that the first words from his upon seeing Cooper's visage were "that's not him." *People v. Coo-*

per, 53 Cal. 3d 771, 801 (1991)

VII. THIS COURT SHOULD PERMIT MR. COOPER TO FILE THE SUCCESSOR PETITION BECAUSE *CLAIM FIVE* IS NOT SUBJECT TO THE REQUIREMENTS OF 28 U.S.C. SECTION 2244 (B)

On January 23, 2004, Mr. Cooper attempted to file in the Superior Court, County of San Diego, a motion to preserve evidence for certain testing post-execution, a petition for writ of *habeas corpus* and two discovery motions pursuant to that writ that would provide Petitioner with critical evidence of his innocence and third party assailants. (Ex. 1 at 3, Ex. 2 at 15-16.) The Superior Court ***refused to accept any of the documents for filing.*** (Ex. 1 at 11, Ex. 2 at 22.) Essentially, the court refused to consider the motions at all, even though the superior court had exclusive jurisdiction to hear at least two of the motions.[6]

Two judges refused Mr. Cooper access to the judicial process. Neither would do more than take a cursory look at the documents. The first judge, Judge Deddeh refused completely to look at the documents. (*See* Ex. 1 at 2, 11.) Judge Deddeh reasoned that he was uncomfortable with the prospect of inserting himself into a process that had already been heard to

[6] California Penal Code Section 1405 requires that a request for DNA testing be brought in the Superior Court in the first instance. Further, the motion to preserve is heard by the court pursuant to its authority to dispose of exhibits after final determination of an action. Cal. Penal Code §§ 1417.1, 1417.5.

some degree by another judge from that court, Judge Kennedy. (Ex. 1 at 9.) Counsel for Mr. Cooper explained (1) that the issues in the instant petition and motions were different from what had been presented to Judge Kennedy, and in the case of the motion to preserve, entirely unrelated (Ex. 1 at 7, 11), and (2) that counsel had already attempted to reach Judge Kennedy and he determined not to hear the matter since he was in trial and believed his obligation to Kevin Cooper's case was completed after he set the execution date (Ex. 1 at 10-11). Judge Deddeh still would not "allow the [motions] to be filed," and instead referred counsel to either the California Supreme Court or to Judge Kennedy. (Ex. 1 at 11.) Judge Deddeh concluded that we were not to file any of the documents with him and that if we wanted we could attempt to file with Judge Kennedy or the California Supreme Court. (*Id.*)

Petitioner, accompanied by the State, then went to Judge Kennedy's courtroom to see if he would receive and consider Mr. Cooper's request on the merits. (Ex. 2 at 15-16.) Judge Kennedy was available and spent a minimal amount of time skimming the materials through which Mr. Cooper was trying to obtain relief. A few moments later, Judge Kennedy also ***refused to accept the papers for filing***. Also Mr. Cooper's counsel emphasized that the sole purpose for the hearing was to determine whether an expedited hearing date to address whether the court would hear Mr. Cooper's

underlying claim. (Ex. 2 at 21.)

Judge Kennedy refused. (Ex. 2 at 22.) Judge Kennedy instead "deferred" the filings to the California Supreme Court for acceptance or rejection, and determined not to hear the claim of a man sentenced to be executed in a mere two and a half weeks and instead required Mr. Cooper to go to the California Supreme Court ***first*** to get relief on claims that were required to be filed in the Superior Court in the first instance. (Ex. 2 at 22.) Twice Mr. Cooper was rejected on claims that the Superior Court should have heard but refused.

The California Supreme Court has been equally unavailable. Petitioner filed for relief on Monday, February 2, requesting that the court hear his petition and order the Superior Court to hear his underlying request. Without even requesting informal briefing – a process that the California Supreme Court utilizes in virtually all capital habeas matters – the court denied the petition in a single paragraph. (Ex. 205.) The judicial process has not been available to Mr. Cooper.

The Superior Court's refusal to allow Mr. Cooper to present allegations concerning violations of his fundamental constitutional rights deprived him of his right to equal access to the courts. The United States Constitution guarantees Mr. Cooper the right to "adequate, effective and meaningful" ac-

cess to established adjudicatory procedures. *Bounds v. Smith*, 430 U.S. 817, 821 (1977); *see also Lewis v. Casey*, 518 U.S. 343, 354 (1996); *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971); *Taylor v. Delatoore*, 281 F.3d 844, 848 (9th Cir. 2002). Moreover, the right to meaningful court access does not hinge on whether a petitioner's allegations would be deemed meritorious by the court or not. *See Allen v. Sakai*, 48 F.3d 1082, 1091 (9th Cir. 1995) (stating that "[a] prisoner need not show, ex post, that he would have been successful on the merits had his claim been considered.")

A state court's outright refusal to accept and consider an inmate's pleadings that fully comported with the state's filing requirements constitutes a clear denial of the right to access to the judicial process. *See Boddie*, 401 U.S. at 380.

Mr. Cooper suffered actual injury as a result of being denied access to the Superior Court. Judge William H. Kennedy's subsequent review of Mr. Cooper's pleadings and decision to defer filing of all pleadings to the Supreme Court did not remedy the superior court's denial of his right to meaningful access to the court because California Penal Code section 1405 *required* Mr. Cooper to file his DNA motion in the Superior Court and the California Supreme Court's subsequent denial of relief foreclosed any opportunity for Mr. Cooper to have his rights vindicated in the state court. Peti-

tioner has therefore demonstrated prima facie that he was deprived of his right to access to the judicial process.

In addition, the Superior Court's refusal to file and consider Mr. Cooper's motions and habeas petition, despite mandatory state law requiring him to file such pleadings in the Superior Court, deprived Mr. Cooper of a state created liberty interest without due process of law. "A state statute may create a constitutionally protected liberty interest if it contains explicit mandatory language creating a right." *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983); *see also Board of Pardons v. Allen*, 482 U.S. 369, 373 (1987) (use of mandatory language creates liberty interest in being granted parole); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Greenholtz v. Inmates of Nebraska Penal*, 442 U.S. 1, 7, 11-12 (1979) (same); *McQuillion v. Duncan*, 306 F.3d 895, 900 (9th Cir. 2002) (California parole scheme used mandatory language creating liberty interest).

The state statutes at issue in this case contain explicit mandatory language creating a right to file the above-mentioned motions and habeas petitions in the superior court. *See* Cal. Rule Court 4.552 ("petition must be heard and resolved in the court in which it is filed"); Cal. Penal Code Section 1405 (requiring filing of DNA application "before the trial court that entered the judgment of conviction in his or her case"); Cal. Penal Code

Section 1473 (mandating acceptance of habeas corpus petition alleging unlawful detention for any reason in superior court). Furthermore, Superior Court Judge Deddeh's extraordinary actions in refusing to accept Mr. Cooper's filings singled Mr. Cooper out for differential treatment in contravention of his right to equal protection. Mr. Cooper has therefore established a prima facie case that the actions of the state courts deprived him of his due process and equal protection rights.

Obviously, Cooper has diligently presented this claim. And, the underlying requests contained in the applications he sought to file are designed to enforce his rights to be able to plead and present facts related to his innocence. But, more importantly, because this claim could not have been raised earlier, it cannot be subject to the requirements of section 2244(b) now. *See Stewart*, 523 U.S. at 644-45 (1998); *Hill*, 297 F.3d at 898-99.

VIII. THIS COURT SHOULD PERMIT MR. COOPER TO FILE THE SUCCESSOR PETITION BECAUSE *CLAIM SIX* SATISFIES THE REQUIREMENTS OF 28 U.S.C. SECTION 2244(B)

In Claim Six, Mr. Cooper alleges that the state failed to disclose prior to trial a Disposition Report that could have shown that Mr. Cooper did not commit the crimes for which he was accused. This evidence, a report from the San Bernardino Sheriff's Department, indicated that Deputy Sheriff Eckley destroyed a pair of bloody coveralls after consultation with his superior

officers. (Exs. 186, 195.) The fact of the actual destruction and Deputy Sheriff Eckley's involvement were presented at trial and have been raised throughout litigation in state and federal court. The existence of the report, and the meaning of such report, however, did not come to light until 1998, when previous counsel was allowed for the first time to review the sheriff's department's microfiche. The claim have been raised in every available forum since, and is re-alleged here.

On June 9, 1983, five days after the homicides in the Ryen home, Detective Eckley met with Diana Roper (also known as Diana Kellison or Diana Furrow) in Mentone, 40 miles from the Ryen home. Ms. Roper provided Eckley with a pair of bloody coveralls which she explained she believed were connected to the murders. Eckley believed Ms. Roper to be a reliable informant because she had given reliable information in a prior homicide case. (Ex. 83.)

Following his meeting with Ms. Roper, Detective Eckley contacted Detective Greg Benge of the Career Criminal Division about the coveralls. Detective Benge instructed Eckley to write a report and forward it to Sergeant Arthur in the homicide division. (Ex. 194.) On June 10, 1983, Sergeant Stodelle told the chief investigating officer, Sergeant William Arthur of the contents of Eckley's report about the bloody coveralls. (Ex. 200 at

2454.)

Eckley's report contained the following information: On June 9, 1983 at 5:00 p.m., Diana Furrow Kellison contacted Eckley. (*Id.*) She said she found a pair of green coveralls in her closet with bloodstains, Arabian horse hair and sweat on them. She suspected that her estranged husband Lee Furrow, who had been paroled three years before after serving time for strangling a female, had put them there. She also told Eckley that she believed the coveralls were linked to the Chino murders and had further information on the suspects that she wanted to relate only to the Homicide Division. (Ex. 194.)

Arthur made no attempt to retrieve the coveralls and did not direct any of his subordinates to do so. (Ex. 83 at 907-08.) Eckley made several attempts in June and July, 1983 to contact the homicide division about the coveralls, but his telephone calls were not returned. (Ex. 185 at 2320.)

Eckley did not submit the bloody coveralls to his department's crime laboratory, although he was aware that sheriff's department regulations required all bloodstained items of evidence to be immediately so submitted. (Ex. 125 at 1162-63.) Sheriff's Department regulations permitted Eckley to destroy the coveralls after ninety days. This would have been in early September 1983. Nonetheless, he did not destroy them at that time. (Ex. 185 at

2321-22.)

The preliminary hearing in Mr. Cooper's case began on November 9, 1983. Coincidentally on December 1, 1983, the day on which the defense began its presentation of evidence at the preliminary hearing, Eckley destroyed the coveralls. (Ex. 185 at 2322.) Eckley claimed that the decision to throw out the coveralls was his alone. He eventually testified at a *Hitch* hearing[7] and before the jury on the destruction of the coveralls. (Ex. 185 at 2320-22; Ex. 125 at 1162; Ex. 200 at 2446-53.) Based upon the testimony presented by Eckley, the jury could only infer that Eckley had destroyed the coveralls on his own, with no input from his superiors. The prosecutor knew that the jurors' conclusions were not being made upon complete information, but did nothing to correct this.

In early May 1984 a *Hitch* hearing on the lawfulness of the destruction, loss, consumption, or failure to gather a number of items of evidence began in Mr. Cooper's case. As a result of the publicity surrounding the hearing, the Kellison-Roper family contacted Mr. Cooper's trial counsel and told him about the coveralls. (Ex. 183 at 2292.) This was the first information that David Negus had about the existence of the bloody coveralls. (*See*

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[7] This is a shorthand method of referring to hearings in California criminal cases at the time of petitioner's arrest and trial to determine whether evidence was destroyed unconstitutionally. *See People v. Hitch,* 12 Cal. 3d

At no time during Mr. Cooper's case did the State disclose to the defense Eckley's Disposition Report.

In December 1998, more than two years after Mr. Cooper's initial federal *habeas* petition, Mr. Cooper's investigator reviewed the Sheriff's Department's microfiche and microfilm file on the Ryen and Hughes homicides. (Ex. 195.) It was only at this time that the Disposition Report came to light. The Disposition Report indicates that the coveralls were destroyed as having no value and that the citizen's report that these items were possibly belonging to the suspect was unfounded. (Ex. 186.) The disposition was reviewed by someone with the initials "K.S." (*Id.*)

Mr. Cooper's investigator, a former police officer, recognized the significance of this report and the information contained on it, *i.e.,* that it indicated that Eckley did not destroy the coveralls on his own initiative, but that he did so after consultation with someone in the homicide division or with his supervisor. (Ex. 195.)

Mr. Cooper's investigator's attempts to discuss Eckley's reports – his initial June 1983 report and the December 1983 Disposition Report – with him were rebuffed as were other attempts to obtain information. (Ex. 195.)

At trial, the only story presented to the jury was one of Eckley de-

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64 (1974).

stroying the coveralls on his own, without any directive from a supervisor. Without the Disposition Report in evidence, the jury could not evaluate Eckley's actions within the correct context. If the Disposition Report had been made available during trial, it would have provided the jury with clear documentary evidence that the destruction of an item pointing to a perpetrator other than Mr. Cooper had been accomplished deliberately by the prosecution. In addition, such an action would have provided the jurors with circumstantial evidence from which they could conclude that other evidence pointing to someone other than Mr. Cooper as the perpetrator similarly was destroyed intentionally as well and would have supported Petitioner's defense that he was framed.

By withholding this crucial information, evidence was presented to the jury in an incomplete and biased manner, in violation of Mr. Cooper's constitutional rights. The jurors would not have convicted Petitioner if they had one more piece of evidence pointing away from him at the perpetrator or if they had reason to discount one of the pieces of prosecution evidence. This was such evidence. As a result of the government's suppression of the Disposition Report and the prosecutor's elicitation of testimony that was effectively false or his failure to correct the same, either alone or in combination with other governmental misconduct alleged herein, had a substantial

and injurious effect on the jury's verdict in this case.

This claim was initially raised in state court in *In re Kevin Cooper,* California Supreme Court No. S077408, filed March 26, 1999, and denied on April 14, 1999. Petitioner then attempted to raise the claim in a successor petition for writ of habeas corpus in this Court pursuant to 28 U.S.C. 2244 (b) in November 4, 1999 in Case No. 99-71430. This Court denied Mr. Cooper's Motion to File a Second Habeas Corpus petition on February 14, 2003. It is raised anew because no court has ever heard the matter on the merits and has been presented as diligently as practicable. He the jury learned that these coveralls were intentionally destroyed, they would have been permitted to draw such an inference that no reasonable fact-finder would have found Cooper guilty.

IX. THIS COURT SHOULD PERMIT MR. COOPER TO FILE THE SUCCESSOR PETITION BECAUSE *CLAIM SEVEN* SATISFIES THE REQUIREMENTS OF 28 U.S.C. SECTION 2244 (B)

During Mr. Cooper's trial, his attorney was given information by the state about a third-party confession to the Ryen/Hughes murders. In Claim Eight, Mr. Cooper alleges that his trial counsel failed to further investigate and to present to the jury that third party confession. The failure to present this evidence fell below the standard one would expect of a reasonably competent attorney. If trial counsel's performance not been deficient, the jury

would have heard the confession and Mr. Cooper would not have been convicted or, failing that, would not have been sentenced to death. *Strickland v. Washington*, 466 U.S. 668 (1984).

Information about the confession was first obtained by Detective Woods on December 17, 1984. Woods received a telephone call from Lt. Henson at the California Medical Facility at Vacaville (CMF), a penal institution within the California Department of Corrections. (Ex. 85.) Henson told Woods he had information about the Kevin Cooper case. (*Id.*) Henson had spoken to an informant named Anthony Wisely, a prisoner at CMF. Wisely told Henson that in November 1984, Wisely had a conversation with Kenneth Koon after Koon had smoked some weed or marijuana. Koon said he went to the Ryen home with two other people and killed the Ryen family. (*Id.* at 924.)

On December 19, Woods interviewed Wisely at CMF. Wisely reported that after both he and Koon smoked marijuana, Koon began to cry. (*Id.*) Wisely identified Koon as affiliated with the Aryan Brotherhood. Koon told Wisely that he and two others went to Chino to collect a debt. (*Id.* at 925.) They went into the house with two axes or hatchets. (*Id.* at 924.) After they returned they told Koon the debt was paid. Koon changed his coveralls at his girlfriend's or "old lady's" house. (*Id.*) His girlfriend

possibly turned in one of the weapons. Wisely could not remember Koon's girlfriend's name. Koon told Wisely he thought they hit the wrong house. (Ex. 85 at 924.)

Woods asked Wisely about the possibility of Woods' talking to Koon. Wisely said that if Woods did so, that Koon would immediately know that Wisely had informed on him. (*Id.* at 925.) If this happened Wisely believed he would become a marked man who would be killed in prison. (*Id.*) Following the interview, Woods left the interview room and examined Koon's prison file. The file showed that from October 11, 1982, to November 7, 1983, a span covering the June 4-5 period during which the murders took place, Koon was out of custody. (*Id.*) Woods also noticed that Koon's emergency contacts included Diana Roper in Mentone and Terry Kellison, also in Mentone. (*Id.* at 926.)

Woods then made the connection between the hatchet and coveralls and Diana Roper's contact with the Yucaipa substation in San Bernardino. (*Id.*) Woods returned to the interview room and asked Wisely if Diana Roper was the name Koon gave as his girlfriend and Wisely said yes. (Ex. 85 at 926.)

Despite Wisely's fears, Woods then interviewed Kenneth Koon before returning to San Bernardino. (Ex. 196.) Koon acknowledged that he knew

Diana Roper and that she was his girlfriend. (*Id.*) He said he remembered the incident in which she turned over bloody coveralls to the Yucaipa sub-station. He believed they belonged to Lee Farrell [sic]. (*Id.*) This occurred directly after the Chino Hills murders. Koon said that law enforcement lost or destroyed the coveralls. (*Id.*) Koon would not answer questions about the Aryan Brotherhood, other than to say that at first he was not affiliated with them. (Ex. 196.)

The trial testimony in the guilt phase of Mr. Cooper's case began on October 18, 1984. Woods' reports were written on December 21, 1984. (Ex. 85 at 926.) They were turned over to Mr. Cooper's lawyer on January 2, 1985, immediately before Petitioner was to testify. Petitioner's counsel said he did not need more time to investigate. (Ex. 199 at 2442.) Immediately thereafter Mr. Cooper testified.

On January 12, 1985, Mr. Cooper's investigator attempted to interview Anthony Wisely at CMF. (Ex. 198.) Wisely refused to be interviewed about his earlier statements. He explained that since his interview with Woods on December 19, he had been in the "hole" or security housing. (*Id.*) Wisely said that if the investigator had been present when Wisely and Koon were talking, the investigator would understand that Mr. Cooper did not commit these crimes. Wisely conveyed to Mr. Cooper's investigator that he

suffered at the hands of the state as a result of trying to be helpful. (*Id.*)

Trial counsel failed to follow-up on the information, despite the fact that key elements of Wisely's information were independently verified by the crime scene, the events of June 1983 concerning the discovery of the coveralls, and the May 1984 interactions with Diana Roper about Lee Furrow and the coveralls. Counsel did not make the connection between the coveralls, Furrow, and the information supplied by Wisely and did not further investigate where Koon lived while out of custody during the time of the Ryen murders. Counsel did not use Koon's information about Lee Furrow. All of these omissions fell below the standard of conduct to be expected of reasonably competent counsel.

Had the jury been allowed to hear this confession, along with all the other evidence presented in the claims addressed herein, there is clear and convincing evidence that no reasonable fact-finder would have found Cooper guilty.

Information surrounding the third-party confession was presented to the California Supreme Court and denied in November of 1997, and twice in the District Court. The lengthy history of this claim has been recounted in numerous pleadings and two opinions by this Court. *Cooper v. Calderon*, 274 F.3d 1270 (9th Cir. 2001); *Cooper v. Calderon*, 308 F.3d 1020 (9th Cir.

2002), both of which denied Cooper's application to file it as a successor claim. Cooper will not attempt to recount the entire saga here. On April 21, 2003, the United States Supreme Court denied Mr. Cooper's petition for writ of *certiorari*. *Cooper v. Calderon*, 123 S.Ct. 1793 (2003). Suffice it to say, there have been years of struggle to get this claim of innocence heard.

X. THIS COURT SHOULD PERMIT MR. COOPER TO FILE THE SUCCESSOR PETITION BECAUSE *CLAIM EIGHT* SATISFIES THE REQUIREMENTS OF 28 U.S.C. SECTION 2244 (B)

In this Claim, Cooper raises his trial counsel's failure to connect the bloody coveralls turned over to police shortly after the crime, to Lee Furrow, a convicted murderer. Trial counsel was aware of Furrow's connection to the coveralls upon receiving the police reports and the reports of his investigator describing Diana Roper's statements. (Exs. 83, 84, 86, 122.) He failed to introduce anything more than the police recovered bloody coveralls from Diana Roper, and destroyed them. (Ex. 200 at 2447-60.)

In a case that hinged on the state's failure to prove Cooper's guilt, and whether lingering doubt would require a life sentence, trial counsel's failure to present the testimony about Furrow fell below the generally recognized standard of care and prejudiced Petitioner. *Strickland*, 466 U.S. 668.

This claim goes directly to Cooper's innocence. The jury remained deadlocked for seven days on guilt. But for the information about Furrow,

standing on its own or when combined with the information about his and Roper's acquaintance Koon, and all the other instances of state misconduct raised herein concerning the evidence, there is clear and convincing evidence that Cooper would not have been convicted.

This claim was initially raised in state court in *In re Kevin Cooper*, California Supreme Court No. S077408, filed March 26, 1999 and denied on April 14, 1999. Petitioner then attempted to raise the claim in a successor petition for writ of habeas corpus in this Court pursuant to 28 U.S.C. Section 2244 (b) in November 4, 1999 in Case No. 99-71430. This Court denied Mr. Cooper's Motion to File a Second Habeas Corpus petition on February 14, 2003.

While a portion of this claim is based on police reports that existed at the time of trial, other reports that substantiate Roper's account were only discovered after post-conviction counsel secured funding to investigate this case (which had been denied by the state court and the district court), through private donations on Mr. Cooper's behalf.

XI. THIS COURT SHOULD PERMIT MR. COOPER TO FILE THE SUCCESSOR PETITION BECAUSE *CLAIM NINE* SATISFIES THE REQUIREMENTS OF 28 U.S.C. SECTION 2244 (B)

In Claim Nine, petitioner challenges his trial counsel's failure to present to the jury evidence that blonde and brown hairs were found clutched in

and removed from the victims' hands during the autopsies. Trial counsel was aware of this information because he received color photographs of hair twined in the hand of one or more of the victims; a San Bernardino County Sheriff's Laboratory Report, dated June 14, 1983, stated that hair was found in the hands of each victim and that these hairs had been removed from the victims' hands during the autopsy; and the autopsy report for Jessica Ryen stated that there were numerous hairs in and adhering to Jessica Ryen's hands. Petitioner has alleged that reasonably competent counsel at the time of Petitioner's trial functioning as a diligent advocate would have presented testimonial, documentary, and pictorial evidence about the hairs found in the victims' hands to the jury and that, but for counsel's omissions, there is a reasonable probability Mr. Cooper would not have been convicted of the charged crimes and would not have been sentenced to death. *Strickland,* 466 U.S. 668.

This claim was initially raised in state court in *In re Kevin Cooper,* California Supreme Court No. S077408, filed March 26, 1999, and denied on April 14, 1999. Petitioner then attempted to raise the claim in a successor petition for writ of habeas corpus in this Court pursuant to 28 U.S.C. Section 2244 (b) in November 4, 1999 in Case No. 99-71430. This Court denied Mr. Cooper's Motion to File a Second Habeas Corpus petition on February

14, 2003.

Counsel were appointed in federal court on June 5, 1995, and were compelled to file an amended petition pursuant to 28 U.S.C. Section 2254 on March 29, 1996.[8] With this petition pending, the district court lifted its stay on April 18, 1997. The district court held a limited evidentiary hearing that concluded on August 13, 1997, and issued an order denying the Petition for Writ of Habeas Corpus on August 27, 1997. Counsel did not receive trial counsel's files until the middle of 1997, several months after they filed their Section 2254 petition and while they were endeavoring to meet the court's deadlines. These deadlines, in light of the length of the trial record and the complexity of the case, were onerous and although counsel met them, a

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[8] Petitioner initially requested the appointment of counsel in the district court on March 24, 1992. The district court per Judge Earl B. Gilliam appointed counsel on March 24, 1992. On March 15, 1994, petitioner's case was transferred to Judge Marilyn Huff. Petitioner's counsel moved to withdraw on June 29, 1994 but was not permitted to do so. Instead, counsel was required to file a Petition for Writ of Habeas Corpus on August 11, 1994.

Thereafter, counsel filed numerous motions to withdraw as counsel, all of which were denied by the court at the same time counsel began to process the filed, grossly incomplete petition.

On April 7, 1995 the court denied a motion by counsel to withdraw and soon thereafter set and execution date for petitioner of June 2, 1995. Petitioner was then forced to prosecute writ proceedings in this Court to prevent the court from requiring counsel to continue. After a game of brinksmanship in which the court allowed petitioner to come within a week of execution without a stay, the district court relented and issued another temporary stay, eventually relieving prior counsel and appointing Robert Amidon and William McGuigan to represent petitioner.

thorough review of the trial record could not be accomplished coincident with meeting the court's schedule for the August 1997 evidentiary hearing. As a result, counsel were literally unable to complete their review of the thousands of pages of material in trial counsel's file until after the district court denied relief on their initial Section 2254 petition. This, combined with severe funding limitations, and the district court's great haste to eliminate Petitioner's case from its docket, effectively precluded counsel from locating the documents and photographs relevant to this claim and appreciating their extraordinary significance.[9] Although the documents existed to state a prima facie case for relief the district court's lockstep processing of Petitioner's case and counsel's late entrance effectively rendered counsel unable to master the factual predicate for the claim through the exercise of due diligence before the court denied their initial Section 2254 petition.

Moreover, counsel has still been unable to marshal the full evidence to demonstrate the prejudice flowing from trial counsel's omission because the State has consistently barred Petitioner's efforts to have mitochondrial DNA testing to determine conclusively whether or not the blonde and brown hairs

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[9] A more complete recitation of the district court's conduct of petitioner's case appears in counsel's November 4, 1999 Motion to File Second Habeas Corpus Petition and earlier in this application.

belonged to the victims. Counsel proceeded as quickly as reasonably possible in presenting this claim and continues to press for the means by which to perfect it.

There is little doubt that the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(B). In Petitioner's case the court need not speculate about whether or not the fact finders would have reached the same conclusion. Immediately after the trial concluded at least two jurors opined that had the balance of evidence shifted by even one piece, Petitioner would have been acquitted or not sentenced to death. (Ex. 108.) The jurors maintain that position today and are particularly distressed about being kept in the dark about the blond and brown hairs. (Exs. 3, 6, 7, 8.)

Moreover, the physical evidence of the photographs and the testimony about the hair in several of the victims' hands would have significantly altered the posture of the defense to Petitioner's benefit, particularly given circumstantial evidence case against Petitioner. *Hart v. Gomez*, 174 F.3d 1067 (9th Cir.) (Failure to investigate and introduce into evidence records to corroborate unsupported testimony demonstrating client's factual innocence.);

Helton v. Secretary of Department of Corrections, 23 F.3d 1322 (11th Cir. 2000) (failure to pursue physical evidence of time of death in circumstantial evidence case was prejudicial in light exculpatory physical evidence). This evidence alone, or in combination with additional information not presented to the jury raises sufficient doubt to undermine confidence in the verdict. Petitioner is therefore entitled to have this claim heard on its merits.

XII. CONCLUSION

For the reasons sated herein, and in the accompanying Petition for a Writ of Habeas Corpus, petitioner requests a stay of his execution scheduled for February 10, 2004. Petitioner meets the requirements of *Barefoot v. Estelle*, 463 U.S. 880 (1983), in that there are substantial grounds on which relief might be granted and petitioner has shown a strong likelihood of relief on the merits. In addition, petitioner meets the requirement of 28 U.S.C.

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Section 2244(b) because the application herein should be approved and he be allowed to file his accompanying petition in the District Court.

Dated: February 6, 2004.

Respectfully submitted,

David T. Alexander
Counsel of Record for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN COOPER,

Petitioner,

v.

JEANNE WOODFORD, Warden, San Quentin State Prison, San Quentin, California,

Respondent.

Case No. 04-70578

DEATH PENALTY CASE

EXECUTION IMMINENT:
Execution Date February 10, 2004

DECLARATION OF SERVICE

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Attorneys for Petitioner Kevin Cooper

DECLARATION OF SERVICE

I am over the age of eighteen years old and not a party to the above-entitled action. My place of employment and business address is Orrick, Herrington & Sutcliffe LLP, Old Federal Reserve Bank Building, 400 Sansome Street, San Francisco, California 94111.

On February 6, 2004, I served a copy of the following documents:

1. Motion for Leave to Proceed *in Forma Pauperis*;

2. Declaration of Kevin Cooper in Support of Motion for Leave to Proceed *in Forma Pauperis*;

3. Motion for Leave to File a Successor Petition for Writ of Habeas Corpus and Request for Stay of Execution;

4. Petition for Writ of *Habeas Corpus* to the District Court for the Southern District of California; and

5. Appendix in Support of Motion for Leave to File a Successor Petition for Writ of *Habeas Corpus*, Volumes 1-9;

by placing a true copy thereof enclosed in a sealed envelope designated by Federal Express with delivery fees provided for and delivering it to a Federal Express office in San Francisco, California authorized to receive documents, addressed to the following at their respective office addresses last given, as follows:

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BILL LOCKYER, ESQ.
Attorney General of the State of California
HOLLY D. WILKENS, ESQ.
Deputy Attorney General
110 West A Street, Suite 1100
San Diego, California 92101

MR. FREDERICK K. OHLRICH
Court Administrator and
Clerk of the Supreme Court
Supreme Court of California
Earl Warren Building
350 McAllister Street
San Francisco, California 94102

and causing it to be personally delivered to:

KEVIN COOPER
C-65304-3-EB-82
San Quentin Prison
San Quentin, California 94974
CONFIDENTIAL LEGAL MAIL

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on February 6, 2004 at San Francisco, California.

Eileen Van Matre